UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 80

Docket No. SF-0752-07-0409-A-1

Fae Driscoll,

Appellant,

v.

United States Postal Service,

Agency.

August 31, 2011

Keith Goffney, Esquire, Los Angeles, California, for the appellant.

Afshin Miraly, Esquire, Long Beach, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the addendum initial decision that awarded $48,091.55 in attorney fees and expenses incurred in connection with her removal appeal, *Driscoll v. U.S. Postal Service*, MSPB Docket No. SF-0752-07-0409-I-1 (Initial Decision, Feb. 22, 2008).[1] For the

[1] The appellant filed a separate request for fees incurred in a compliance proceeding that followed the underlying removal appeal. The administrative judge granted that request in part, awarding $36,572.50 in attorney fees. *Driscoll v. U.S. Postal Service*, SF-0752-07-0409-A-2 (Addendum Initial Decision, Nov. 3, 2010). Neither party has petitioned for review of that decision.

reasons set forth below, we GRANT the appellant's petition, AFFIRM the addendum initial decision as MODIFIED, and award $58,779.68 in attorney fees and expenses.

BACKGROUND

¶2 Effective March 2, 2007, the agency removed the appellant from the position of Supervisor, Customer Service, EAS-17, based on two charges. Initial Appeal File (IAF), Tab 10, Subtab 4A.[2] The appellant filed a timely appeal with the Board, raising affirmative defenses of discrimination based on sex, age, race, and national origin, and reprisal for prior equal employment opportunity (EEO) activity. IAF, Tabs 1, 38. She was at that time represented by a non-attorney. Subsequently, in April 2007, the appellant sought the services of attorney Keith Goffney to represent her before the Board and in a related EEO proceeding. Attorney Fee File (AFF), Tab 7, Exhibit 1.

¶3 Following a hearing, the administrative judge sustained the first charge but not the second. IAF, Tab 89 (Initial Decision, Feb. 22, 2008). She rejected the appellant's affirmative defenses, but mitigated the removal to a demotion to a vacant non-supervisory position with the least reduction in grade and pay. *Id.* That decision became final on October 7, 2008, when the Board denied both the agency's petition and the appellant's cross-petition for review.

¶4 The appellant filed a timely motion for attorney fees, seeking an award of $86,137 for 344.55 hours of legal services rendered by Goffney. AFF, Tab 1. In addition, she requested recovery of $5590 spent obtaining a copy of the hearing transcript, and $1,221.05 in fees and expenses charged by Spence Hughes and Associates, who had previously represented her in the EEO proceeding. AFF, Tabs 7, 8. The appellant subsequently requested an additional $3,862.50 for 15.45 hours billed in connection with the attorney fee motion. AFF, Tabs 12, 15.

---

[2] The decision letter describes three charges, the first two of which the administrative judge merged into a single charge with two specifications. IAF, Tab 53.

¶5 The administrative judge granted the appellant's petition in part, finding that she was entitled to a portion of the claimed attorney fees. AFF, Tab 16 (Addendum Initial Decision, Apr. 1, 2009). In calculating the amount of the award, the administrative judge disallowed the hourly fees charged by Spence Hughes, and 108.8 of the 344.55 hours claimed for services rendered by Goffney in connection with the underlying appeal. *Id*. She then reduced the remaining 235.75 hours by 25 percent to account for the appellant's limited success, leaving 176.81 hours, to which she added the 15.45 hours requested for the attorney fee proceeding. *Id*. The administrative judge further determined that $250 was a reasonable hourly rate, yielding $48,065 in fees for 192.26 hours attorney time. *Id*. at 26. She denied recovery of the $5590 spent to obtain a copy of the hearing transcript, but awarded $26.55 charged by Spence Hughes for an overnight delivery to Goffney, for a total award of $48,091.55. *Id*. at 27.

¶6 In her petition for review of the addendum initial decision, the appellant contends that the administrative judge erred in striking the following hours: 22 hours relating to the appellant's affirmative defenses; 5.95 hours relating to witness Andrew Juszczak, who gave testimony concerning the first charge; 3.5 hours spent preparing and serving the motion and supplement to the motion to compel service of the agency file; 3.6 hours relating to the appellant's opposition to the agency's motion to accept its late-filed petition for review; and 25 claimed hours for email status reports and consultations. Petition for Review File (PFR File), Tab 5. The appellant further objects that the administrative judge doubly penalized her by segregating hours spent on unsuccessful claims in addition to imposing the 25 percent reduction. *Id*. In addition, the appellant argues that the 25 percent reduction was excessive, since her current position pays only 10 percent less than the position from which she was demoted. *Id*. The appellant also contends that the $5590 spent obtaining a hearing transcript should be recoverable. *Id*.

ANALYSIS

Prevailing party status

¶7 To establish entitlement to an award of attorney fees under 5 U.S.C. § 7701(g)(1), an appellant must show that: (1) she was the prevailing party; (2) she incurred attorney fees pursuant to an existing attorney-client relationship; (3) an award of fees is warranted in the interest of justice; and (4) the amount of fees claimed is reasonable. *Hart v. Department of Transportation*, 115 M.S.P.R. 10, ¶ 13 (2010). Here, the administrative judge found that the appellant was the prevailing party in the underlying appeal, that fees were incurred pursuant to an attorney-client relationship, and that an award was warranted in the interest of justice on the grounds that the agency knew or should have known that it would not prevail on the merits. The agency has not challenged these findings by filing a petition or cross-petition for review, and we discern no basis for disturbing them. *See Hart*, 115 M.S.P.R. 10, ¶ 13.

¶8 Before turning to the reasonableness of the fees, we first clarify the scope of the appellant's status as a prevailing party. In *Koerner v. Office of Personnel Management*, 55 M.S.P.R. 150 (1992), the Board held where an appellant obtains relief in the initial decision, but does not succeed in obtaining additional relief on petition for review, she is a prevailing party with respect to the initial decision, but not with respect to her unsuccessful petition. *Id*. at 152-53 (citing *Vandemark v. Department of the Navy*, 26 M.S.P.R. 81, 82 n.3 (1985)). Following *Koerner*, the administrative judge concluded that the appellant was not a prevailing party with respect to her cross-petition for review, which was denied. Addendum Initial Decision at 21. The administrative judge went on to find that the appellant could nonetheless receive reasonable fees for time devoted to opposing the agency's petition for review, as she did prevail in that endeavor. *Id*.; *see Freeman v. Department of Veterans Affairs*, 66 M.S.P.R. 125, 130-31 (1995) (time spent preparing a response to an agency petition for review is compensable, but time spent on an unsuccessful cross-petition for review is not).

¶9 Contrary to *Koerner* and *Freeman*, however, the Board does not determine prevailing party status on a line-item basis. Title 5 U.S.C. § 7701(g)(1) provides that fees may be awarded if, among other things, the appellant is "the prevailing party" in "a case" before the Board. While an appellant may win on one motion or phase of an appeal, and the agency on another, for purposes of the fee-shifting statute "there can be, by definition, only one prevailing party." *See Shum v. Intel Corp.*, 629 F.3d 1360, 1363-67 (Fed. Cir. 2010) (interpreting similar language at Rule 54(d) of the Federal Rules of Civil Procedure); *see also Kravitz v. Office of Personnel Management*, 75 M.S.P.R. 44, 47 (1997) (while the Board is not bound by the Federal Rules, it may look to them for guidance). An appellant is, or is not, a prevailing party in the case as a whole, and whether she may be deemed a prevailing party depends on the relief ordered in the Board's final decision. *See Baldwin v. Department of Veterans Affairs*, 115 M.S.P.R. 413, ¶ 11 (2010) ("The determination of an award of attorney fees is based upon the final decision of the Board and whether, by the final decision, the appellant is a prevailing party."). Here, the appellant's cross-petition for review, though unsuccessful, was filed in support of a single litigation that culminated in an enforceable final decision against the agency that changed the legal relationship between the parties. *See Miller v. Department of the Army*, 106 M.S.P.R. 547, ¶ 7 (2007). Accordingly, we conclude that the appellant qualifies as a prevailing party with respect to the underlying appeal as a whole, including proceedings at both the regional level and before the full Board.

Determining the reasonable fee award

¶10 In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court set forth a scheme for determining a reasonable fee award in a case where the prevailing party did not obtain all of the relief requested.[3] The most useful starting point,

[3] While *Hensley* concerned an award of attorney fees pursuant to 42 U.S.C. § 1988, the Court indicated that the principles set forth in its opinion are "generally applicable to all cases in which Congress has authorized an award of fees to a 'prevailing party.'"

the Court explained, is to take the hours reasonably spent on the litigation multiplied by a reasonable hourly rate. *Hensley*, 461 U.S. at 433. This is the "lodestar" which the Board uses in determining the fee award. *Lizut v. Department of the Navy*, 42 M.S.P.R. 3, 7-8 (1989). The initial calculation should exclude hours for which the prevailing party failed to provide adequate documentation, and should also exclude hours that were not reasonably expended. *Hensley*, 461 U.S. at 433-34. In the second phase of the analysis, the lodestar may be adjusted upward or downward based on other considerations, including the crucial factor of the "results obtained." *Id*. at 434. In some cases, it may be appropriate to reduce the lodestar to reflect the party's failure to obtain all the relief she requested.[4] *Id*. However, a reduction of the lodestar to account for the party's success on only some of her claims for relief is distinct from a finding that hours devoted to unsuccessful claims or issues were not reasonably spent. *See id*. In accordance with *Hensley*, we will determine the hours that were reasonably spent on the underlying appeal as a whole before addressing what adjustment, if any, should be made to the lodestar in light of the appellant's incomplete success.

The initial lodestar calculation

¶11 The burden of establishing the reasonableness of the hours claimed in an attorney fee request is on the party moving for an award of attorney fees. *Casali v. Department of the Treasury*, 81 M.S.P.R. 347, ¶ 13 (1999). The party seeking an award of fees should submit evidence supporting the hours worked and

---

Hensley, 461 U.S. at 433 n.7. These include attorney fee cases under 5 U.S.C. § 7701(g). *See Nadolney v. Environmental Protection Agency*, 30 M.S.P.R. 561, 564 (1986).

[4] Where the relief obtained is merely nominal, the Board may bypass the lodestar calculation altogether and proceed directly to a conclusion that the reasonable fee award is no award at all. *Farrar v. Hobby*, 506 U.S. 103, 114-16 (1992); *see, e.g., Garcia v. U.S. Postal Service*, 83 M.S.P.R. 458, ¶¶ 6-8 (1999). In such a case, the determination of reasonable fees is indistinguishable from the interest of justice analysis.

exclude hours that are excessive, redundant, or otherwise unnecessary. *Hensley*, 461 U.S. at 433-44. The administrative judge need not automatically accept claimed hours, but may disallow hours for duplication, padding, or frivolous claims, and impose fair standards of efficiency and economy of time. *See Casali*, 81 M.S.P.R. 347, ¶ 14; *Foley v. U.S. Postal Service*, 59 M.S.P.R. 413, 423 (1993); *Kling v. Department of Justice*, 2 M.S.P.R. 464, 472-73 (1980). If, however, the administrative judge decides not to award fees for hours of service that are adequately documented by attorneys, she must identify those hours and articulate the reasons for their elimination. *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir. 1986), *modified on other grounds*, 827 F.2d 761 (Fed. Cir. 1987).

¶12 In *Wilson v. Department of Health & Human Services*, 834 F.2d 1011, 1012 (Fed. Cir. 1987), the Federal Circuit held that if an administrative judge has concerns about deficiencies in a motion for attorney fees, she should afford the party an opportunity to address the matter before rejecting the claims. Here, the administrative judge disallowed numerous claimed hours without first communicating her doubts to the appellant and providing her an opportunity to answer. Because the appellant's attorney has proffered explanations for some of these charges in her petition for review, we are able to make a determination regarding the reasonableness of the disputed fees without remanding the matter to the administrative judge. *See Hart*, 115 M.S.P.R. 10, ¶ 20.

¶13 The appellant first objects that, prior to imposing a 25 percent reduction to the claimed hours, the administrative judge eliminated 22 hours devoted to the appellant's discrimination and retaliation claims. In reducing those hours, the administrative judge relied on the fact that the claims were unsuccessful and did not make a finding that the claimed hours were unreasonable per se. Addendum Initial Decision at 20-21. Because the lodestar, prior to adjustment, is based on the hours reasonably expended on the appeal as a whole, it would be premature at this stage of the analysis to disallow hours that were reasonably expended

pursuing the appellant's affirmative defenses before the Board. We note, however, that of the 22 hours in question, 8.5 were spent preparing for and participating in an EEO mediation. AFF, Tab 1. The Board has held that fees may be awarded for time spent on a separate and optional, but factually related, proceeding only if, among other things, the work performed significantly contributed to the success of the Board proceeding. *Bonggat v. Department of the Navy*, 59 M.S.P.R. 175, 178 (1993); *see Nadolney v. Environmental Protection Agency*, 30 M.S.P.R. 561, 565 (1986).[5] Because the appellant did not prevail on her affirmative defenses, the work performed in connection with the EEO proceeding did not significantly contribute to her success in the Board appeal and, therefore, is not compensable. Accordingly, we restore only the remaining 13.5 hours to the lodestar.

¶14 The appellant also objects to the reduction of 5.95 hours related to witness Andrew Juszczak. In disallowing the claimed hours, the administrative judge relied on the fact that Goffney's efforts with respect to that witness were only partly successful. In particular, the administrative judge noted that she did not admit Juszczak's written statements into the record and permitted only very limited testimony to a matter relating to the first charge, which was ultimately sustained. Addendum Initial Decision at 11; *see* Hearing Transcript at 798. However, as with the appellant's unsuccessful affirmative defenses, the fact that the appellant did not prevail on the first charge does not warrant reduction of the hours at this stage of the analysis. Nor is a reduction warranted on the grounds that the administrative judge did not permit the full range of proffered testimony. The Board has disallowed as unnecessary time spent preparing for the

---

[5] We stress that this standard applies only to work performed outside the four corners of the litigation before the Board. *See Mudrich v. Department of Agriculture*, 92 M.S.P.R. 413, ¶ 12 n.1 (2002). To the extent we implied otherwise in *Carson v. Department of Energy*, 86 M.S.P.R. 192, ¶ 24 (2000), we now modify that holding. *See also Martinez v. U.S. Postal Service*, 89 M.S.P.R. 152, ¶ 21 (2001) (citing *Carson*); *Diehl v. U.S. Postal Service*, 88 M.S.P.R. 104, ¶ 12 (2001) (same).

examination of witnesses who were not approved and did not testify at the hearing. *See Freeman*, 66 M.S.P.R. at 132. Juszczak did testify, however, and it is unremarkable that an administrative judge would exercise her broad discretion to limit the examination of a witness. *See, e.g.*, *Box v. U.S. Postal Service*, 51 M.S.P.R. 401, 405 n.2 (1991). To reduce the claimed hours under these circumstances would "verge on nit-picking." *See Wilson*, 834 F.2d at 1013. Accordingly, we restore the 5.95 hours to the lodestar.

¶15 We discern no error in the administrative judge's decision to disallow 3.5 hours relating to a motion filed by Goffney to compel production of a paper copy of the agency file. *See* Addendum Initial Decision at 22-23. At the time Goffney filed the motion and a supplement thereto, the agency had provided him with only a compact disc containing an electronic version of the file, which he was unable to open. IAF, Tabs 19, 22. The agency had also failed to serve a copy of the paper file on the appellant's former representative. IAF, Tab 11. The agency had, however, served a copy of the paper file on the appellant herself. *See* IAF, Tab 10. Because Goffney already had, or should have had, access to the paper file, the time devoted to filing a motion to compel its production was unnecessary and therefore not compensable.

¶16 The appellant also challenges the disallowance of 3.6 hours spent opposing the agency's motion to accept its late-filed petition for review. For purposes of the initial lodestar calculation, we agree. We note that in *Meadows v. Department of the Navy*, 68 M.S.P.R. 463 (1995), a case before the Board on the agency's petition for review of an addendum initial decision awarding attorney fees, the Board awarded additional attorney fees for time spent responding to the agency's petition, which was denied, but deducted an hour because the appellant did not succeed in her motion to dismiss the agency's petition as untimely filed. *Id*. at 465 (citing *Boese v. Department of the Air Force*, 784 F.2d 388, 391 (Fed. Cir. 1986)). Such a reduction, however, would not take place until the second stage of the *Hensley* analysis. At this stage, the question is whether the hours

spent opposing the agency's motion were reasonably spent, without regard to the appellant's success or failure on that particular issue. Again, the administrative judge did not find that the 3.6 claimed hours were unreasonable per se. Accordingly, we restore those hours to the lodestar.

¶17 The appellant further contends that the administrative judge erred in disallowing 25 hours claimed for "status memoranda" emails and "consultations" during the initial appeal and petition for review proceedings. *See* Addendum Initial Decision at 24. We agree in part. First, the administrative judge's finding that the hours "appear to be excessive and reflect padding" is conclusory and does not constitute an adequate justification for their elimination. *See Crumbaker*, 781 F.2d at 195 (the Board's remark that "the record suggests duplicative effort" was "wholly inadequate" under the required standard). Furthermore, the appellant has now offered some justification for the hours on petition for review:

> [The 25 hours disallowed] included time expended by counsel to regularly apprise and consult with Appellant regarding various legal theories, strategies, responses and approaches to be taken during the course of prosecuting her appeal. Rather than utilizing near-daily phone conversations or office visits, Appellant and her counsel utilize[d] email extensively for most communication purposes. Counsel, as well as Appellant, chose the use of frequent written status reports and found such use invaluable as a means to collaboratively prosecute the appeal in an organized manner.

PFR File, Tab 5 at 13-14. The Board has held keeping a client informed of the status of her case is a legitimate activity related to the appeal. *Ruble v. Office of Personnel Management*, 96 M.S.P.R. 44, ¶ 12 (2004); *Hooks v. U.S. Postal Service*, 42 M.S.P.R. 225, 228-29 (1989). Time reasonably spent on email communication as an alternative to in-person or phone consultation may also be compensable. *Cf. Diehl v. U.S. Postal Service*, 88 M.S.P.R. 104, ¶ 16 (2001) (allowing time spent by an attorney writing cover notes to the appellant "about matters relevant to the handling of the case" which "could have been put into a formal letter, which would have been much more time consuming and costly to

prepare"). Based on the appellant's explanation, we find that she is entitled to fees for time reasonably spent on email status reports and consultations.

¶18 The frequency of these activities and the hours charged, however, are excessive on their face. *Cf. Hooks*, 42 M.S.P.R. at 229 (allowing 2 hours for telephone conversations with the appellant concerning the status of the appeal, which occurred at intervals of several months). The appellant implicitly concedes that additional documentation would be needed to support the full extent of the claimed hours, stating that "[p]roof of the necessary use of extensive email status reports and consultations can be shown, if requested, by an email index of the dates of all such communications." PFR File, Tab 5 at 14. The appellant did not provide such evidence in her petition for review, however, and she has given no explanation for her failure to do so. In the absence of documentation that would justify an expenditure of 25 hours on status reports and consultations, we find it appropriate to restore 2 of the claimed hours to the lodestar. *See Hensley*, 461 U.S. at 433 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Hooks*, 42 M.S.P.R. at 229.

¶19 Finally, as discussed above, we have reversed the administrative judge's finding that the appellant lacked prevailing party status with respect to her own cross-petition for review. Consequently, time reasonably spent in connection with that pleading should not on that account be excluded from the lodestar. Based on our review of the billing statement and the pleadings relating to the appellant's cross-petition, we find that Goffney reasonably spent 31.95 hours on the cross-petition and related motions on the following dates: March 26, May 5, June 26, June 28-30, and July 1-2, 2008.[6] *See* AFF, Tab 1. Accordingly, we include those hours in the lodestar calculation.

¶20 In sum, we conclude that, of the 108.8 hours the administrative judge disallowed prior to imposing the 25 percent reduction, 57 hours should be

[6] We exclude the hours claimed for status reports and consultations, which we have already addressed above.

restored, yielding a total of 292.75 hours reasonably devoted to the underlying appeal. The agency has not contested the administrative judge's determination that $250 was a reasonable hourly rate for Goffney's services, and we discern no basis to disturb her finding. *See Hart*, 115 M.S.P.R. 10, ¶ 14. Multiplying the two figures yields an initial lodestar figure of $73,187.50.

Adjusting the lodestar

¶21 We now turn to the question of what adjustment, if any, should be made to the lodestar in light of the appellant's failure to obtain all of the relief she requested. Where, as here, a party is entitled to an award of attorney fees but did not succeed on every issue, the most important factor to be considered is the results that were obtained. *Hensley*, 461 U.S. at 434. In this situation, two questions must be addressed: first, whether the appellant failed to prevail on claims that were unrelated to the claims on which he succeeded; and second, whether the appellant achieved a level of success that makes the hours reasonably expended a satisfactory basis for making the fee award. *Id*.

¶22 If the party seeking fees presented unrelated claims for relief, based on different facts and legal theories, then work on an unsuccessful claim will not be compensated, even if the hours were reasonably spent. *Hensley*, 461 U.S. at 434-35. In this scenario, unrelated and unsuccessful claims will be treated "as if they had been raised in separate lawsuits." *Id*. Thus, if an appellant makes multiple, distinct requests for relief in a single Board appeal, each of which could form the basis of a separate appeal, the Board will deduct the hours spent on unsuccessful claims. *Taylor v. Department of Justice*, 69 M.S.P.R. 299, 305 (1996); *see, e.g., Roman v. Department of the Army*, 72 M.S.P.R. 409, 419-20 (1996) (an appellant was not entitled to fees incurred in connection with his unsuccessful claim for consequential damages, which was based on a different statutory provision than his successful claim for costs), *aff'd*, 129 F.3d 134 (Fed. Cir. 1997) (Table); *Spezzaferro v. Federal Aviation Administration*, 32 M.S.P.R. 643, 648-49 (1987) (appellants who prevailed on one of two back-pay claims

were not entitled to fees in connection with the unsuccessful claim, where there was "no common core of facts" underlying the claims).

¶23 In other cases, such as an ordinary appeal of a single adverse action, the party entitled to a fee award will have raised a single claim or related claims for relief that could not have been appealed separately. *See Smit v. Department of the Treasury*, 61 M.S.P.R. 612, 617 (1994). If the party in such a case has obtained "excellent results" in spite of not succeeding on every issue, she should recover a fully compensatory fee, encompassing all hours reasonably spent on the litigation:

> In these circumstances, the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley, 461 U.S. at 435 (citations omitted); *see*, *e.g.*, *Heath v. Department of Transportation*, 66 M.S.P.R. 101, 105-06 (1995). This approach may be appropriate even where the party does not obtain all the relief she requested, provided the relief obtained was "substantial." *See Hensley*. 461 U.S. at 426-28, 436 (where plaintiffs involuntarily confined to a maximum-security unit of a state hospital prevailed on five out of six claims that conditions at the unit violated their constitutional right to minimally adequate treatment, a fee award including time spent on the unsuccessful claim may have been reasonable "in light of the substantial relief obtained"); *Naekel v. Department of Transportation*, 884 F.2d 1378, 1379 (Fed. Cir. 1989) (a fractional division of the attorney fee award was not appropriate where an appellant who succeeded on four of six compliance issues "prevailed in the main, achieving more than 'partial or limited success,' although he did not receive all the relief he requested").

¶24 If, on the other hand, a prevailing party who has raised one or more related claims has achieved only "partial or limited success," an award based on the hours spent reasonably on the litigation as a whole times a reasonable hourly rate

may be an excessive amount, even where the claims were interrelated, nonfrivolous, and raised in good faith. *Hensley*, 461 U.S. at 436. In this scenario, the tribunal awarding fees has discretion to make an equitable judgment as to what reduction is appropriate. *Id*. at 436-37. It may adjust the lodestar downward by identifying specific hours that should be eliminated or, in the alternative, reducing the overall award to account for the limited degree of success. *Id*.; *Smit*, 61 M.S.P.R. at 619.

¶25 In sum, where an appellant is entitled to an award of attorney fees but does not succeed on every claim or issue, the case will fall into one of three distinct categories, each requiring a different approach for determining which fees are compensable:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the . . . court did not adopt each contention raised. But where the plaintiff achieved only limited success, the . . . court should award only that amount of fees that is reasonable in relation to the results obtained.

Hensley, 461 U.S. at 440.

¶26 In *Del Prete v. U.S. Postal Service*, 104 M.S.P.R. 429 (2007), the Board suggested that the first approach should be followed where an appellant prevails only on the issue of penalty. *Id*., ¶ 15. In such a case, the Board held, the award of fees is limited to legal fees attributed to the change in penalty, and any other argument pursued by the appellant, such as an unsuccessful challenge to the charge, should be treated as an unrelated claim for which the appellant may not receive compensation. *Id*. That holding was incorrect, and we hereby overrule it. In a typical removal appeal, such as the one before us, the appellant asserts a single claim for relief under 5 U.S.C. §§ 7513(d) and 7701, and seeks a single desired outcome, namely, that the Board set aside the removal action. The appellant may raise alternative arguments in support of that effort—for example,

as the appellant did here, by challenging the charges, the reasonableness of the penalty, and raising an affirmative defense of discrimination. These, however, are not distinct claims for relief that could be treated "as if they had been raised in separate lawsuits." *See Hensley*, 461 U.S. at 434-35. Thus, such a case does not fall into the first *Hensley* category, and the Board should not automatically disallow compensation for fees relating to other issues.

¶27 The Board should instead consider whether the degree of success warrants an award based on all hours reasonably spent on the litigation and, if not, what adjustment is appropriate. In doing so, the Board will weigh the significance of the relief obtained against the relief sought. *Smit*, 61 M.S.P.R. at 617. As the Court emphasized in *Hensley*, there is no "precise rule or formula" for making such a determination. 461 U.S. at 436. In some cases, the Board has found that an appellant who obtained mitigation of a penalty is entitled to compensation for attorney time devoted to unsuccessful alternative arguments. *See Freeman*, 66 M.S.P.R. at 128-29, 133-34 (where the appellant obtained mitigation of the removal penalty to a 90-day suspension, based on a finding of whistleblowing reprisal, hours reasonably spent on unsuccessful discrimination and retaliation claims and a challenge to the sustained charge were compensable); *Nickerson v. U.S. Postal Service*, 55 M.S.P.R. 92, 96-97 (1992) (awarding all hours claimed where the charge was sustained but the appellant obtained mitigation of the penalty from removal to a 120-day suspension). In other cases, the appellant's incomplete success may warrant an adjustment to the lodestar. *See Boese*, 784 F.2d at 391 (remanding for determination of the appropriate reduction of the fee award).

¶28 While the appellant in this case obtained some measure of success by prevailing on the second charge and having her removal mitigated to a demotion, she nonetheless suffered a severe penalty. Under these circumstances, we find that the appellant obtained only "partial or limited" relief in the underlying appeal, and that a downward adjustment to the lodestar is warranted. *See*

Hensley, 461 U.S. at 436, 440. The administrative judge found it appropriate to adjust the lodestar by imposing a global reduction, and we defer to her judgment on that point. *See Sprenger v. Department of the Interior*, 34 M.S.P.R. 664, 669 (1987) (the administrative judge who decided the case on the merits is in the best position to determine whether the amount requested is reasonable). Prior to applying the reduction, however, the administrative judge also docked specific hours relating to the sustained charge and the appellant's unsuccessful discrimination and retaliation claims. We agree with the appellant that it would be inequitable to penalize her twice for her lack of success on those issues, and we will therefore apply a global reduction only.

¶29 With regard to the amount of the reduction, the appellant contends that, because her current pay is only 10 percent less than she received in her former position, the lodestar should be reduced by no more than 10 percent. There are, however, other factors to be considered in determining her degree of success in the underlying appeal. In addition to the loss in pay, the appellant has also suffered a change in rank to a non-supervisory position, and she does not have the clean disciplinary record she would have obtained had the removal been reversed altogether. Considering the significance of both the relief awarded and the relief sought and not obtained, we discern no basis to disturb the administrative judge's finding that a 25 percent reduction of the lodestar would fairly reflect the appellant's limited success. *Cf. Lizut*, 42 M.S.P.R. at 9. Applying that reduction and rounding to the nearest cent, we arrive at an award of $54,890.63 for fees incurred during the underlying appeal.

Additional fees and expenses

¶30 In addition to fees for hours expended on the underlying appeal, the appellant is entitled to compensation for reasonable fees incurred with respect to her successful attorney fee petition. *Russell v. Department of the Navy*, 43 M.S.P.R. 157, 162 (1989), *modified on other grounds by Garstkiewicz v. U.S. Postal Service*, 50 M.S.P.R. 476 (1991). Because no hearing was held on the

attorney fee motion, we need not defer to the administrative judge's determination that the 15.45 claimed hours were reasonable. *Howard v. Office of Personnel Management*, 79 M.S.P.R. 172, ¶ 7 (1998). The agency has not disputed her finding, however, and based on our review of the billing statement, we discern no basis for disturbing it. Multiplying the 15.45 hours reasonably expended times an hourly rate of $250 yields a lodestar of $3,862.50. Because the appellant has obtained substantial success with respect to her attorney fee petition, we award the entire sum.[7]

¶31 As for expenses, the administrative judge properly denied the appellant's request to recover the cost of obtaining a hearing transcript. *Russell*, 43 M.S.P.R. at 166. It is well established that the cost of transcripts is borne by the appellant. *Id*. (citing *Helt v. Veterans Administration*, 34 M.S.P.R. 165 (1987)). The appellant has invited the Board to reconsider that holding, but we find no reason for doing so. Accordingly, we award only the $26.55 in costs which the administrative judge identified below. Adding that figure to what we have found to be reasonable fees for the underlying appeal and attorney fee petition, we arrive at a total award in fees and expenses of $58,779.68.

ORDER

¶32 We ORDER the agency to pay the attorney of record $58,779.68 in fees and expenses. The agency must complete this action no later than 20 days after the date of this decision. *See generally* Title 5 of the United States Code, section 1204(a)(2) (5 U.S.C. § 1204(a)(2)).

¶33 We also ORDER the agency to tell the appellant and the attorney promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant and the attorney to provide all necessary information that the agency

---

[7] The appellant has not requested fees incurred in connection with the instant petition for review.

requests to help carry out the Board's Order. The appellant and the attorney, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶34 No later than 30 days after the agency tells the appellant or the attorney that it has fully carried out the Board's Order, the appellant or the attorney may file a petition for enforcement with the office that issued the initial decision on this appeal, if the appellant or the attorney believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant or the attorney believes the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. *See* 5 C.F.R. § 1201.182(a).

¶35 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.